

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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IN THE MATTER OF:

JOHN S. MAZELLA,

CASE NO. 10-23122(rdd)

Debtor.

CHAPTER 13

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JOHN S. MAZELLA,

Plaintiff,

Vs.

ADV. PROC. 10-08455(rdd)

FELDSTEIN,

Defendant.

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United States Bankruptcy Court

300 Quarropas Street

White Plains, New York 10601

December 12, 2013

11:37 AM

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

1 Adversary Proceeding: 10-08455:

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3 HEARING re: Motion for Summary Judgment

4 HEARING re: Cross Motion for Summary Judgment

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Transcribed by: Acorn Transcriptions, Inc.

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16 BY: EDWARD R. MINSON, ESQ.

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1 P R O C E E D I N G S

2 THE COURT: Mazella vs. Feldman -- Feldstein,  
3 excuse me.

4 MS. ORTIZ: Good afternoon or good morning,  
5 Your Honor, Norma Ortiz for the Debtor.

6 MR. MINSON: And Edward Minson from Stein Riso  
7 Mantel McDonough for Mr. Feldstein.

8 THE COURT: Okay.

9 MS. ORTIZ: Your Honor, we made a motion, there  
10 was a motion filed by Daniel O'Hara on behalf of the  
11 Debtor. And Mr. O'Hara asked me to argue it, Your Honor,  
12 because I am very familiar with the facts of the case.

13 THE COURT: Okay.

14 MS. ORTIZ: And --

15 THE COURT: It's a motion for summary judgment.

16 MS. ORTIZ: It was a motion for -- and it was,  
17 and it was brought on in part after the last hearing,  
18 Your Honor, if you recall this case is based primarily on  
19 a bankruptcy stipulation and order that was signed by  
20 Judge Hardin. There was a collection effort by one of  
21 the creditors that was not paid pursuant to that  
22 stipulation. For a couple of years in the state court  
23 there were orders entered in the state court and the  
24 debtor has been trying to compel Mr. Feldstein to pay  
25 this last remaining debt.

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1                   We've been before you many times, and one of  
2 the primary issues that was raised on many occasions was  
3 the assertion that the debtor was barred by the statute  
4 of limitations because of the timing of his complaint.

5                   And we've had a number of discussions and  
6 papers have been filed and we have asserted, Your Honor,  
7 primarily two arguments; one is that the order is binding  
8 and there is no statute of limitations that bars this  
9 obligation. The order is very clear. Mr. Feldstein  
10 binds himself to make these payments and to reimburse Mr.  
11 -- Dr. Mazella.

12                  And alternatively we argue that because the  
13 payments went through 2005 that if the Court were to find  
14 for some reason that the order was not binding, we are  
15 not barred by the statute of limitations.

16                  There was a motion to dismiss our second  
17 amended complaint, and Your Honor indicated in part based  
18 upon the Dreier case and the theory that we had discussed  
19 that the payments have gone within the six-year period.  
20 You denied that motion to dismiss and based upon that we  
21 made the motion for summary judgment because it's the  
22 debtor's position that there really is no question of  
23 fact, material fact at this point.

24                  If Your Honor were to find that we're just  
25 seeking to enforce an order, a final order of Judge

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1 Hardin, the statute of limitations doesn't come into play  
2 and we could finally move towards conclusion in this  
3 case.

4 And that was inspired the motion --

5 THE COURT: The summary judgment motion.

6 MS. ORTIZ: The summary judgment motion.

7 THE COURT: And there's a cross motion for  
8 summary judgment also, right?

9 MR. MINSON: Yes, that is correct, Your Honor.

10 THE COURT: Okay. And you contend that the --

11 MS. ORTIZ: Well --

12 THE COURT: -- that the reliance on the 2001  
13 bankruptcy order and agreement is time barred and that,  
14 to the extent of the complaint relies upon the October  
15 2004 settlement agreement that Mr. Feldstein is not  
16 primary -- is not primarily obligated under that  
17 agreement.

18 MR. MINSON: That is correct, Your Honor.

19 And I think that at the last time, I think, at  
20 the hearing there was questions of fact and I don't think  
21 it was so cut and dry --

22 THE COURT: Well I denied the motion to dismiss  
23 because there was sufficient evidence in the record to  
24 survive a motion to dismiss that there had been payments  
25 by Mr. Feldstein that brought the limitations period

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1 under the 2001 agreement up to the date of the petition.

2 And then the complaint was filed within two years after  
3 the date of the petition.

4 MR. MINSON: And Your Honor just to address  
5 those issues, the 2001 stipulation, Mr. Feldstein was  
6 required under that agreement to make payments to Mr.  
7 Mazella in the amount of \$12,500, you know, until I think  
8 they reached a number of approximately \$200,000.

9 Now he breached that agreement in 2003. At the  
10 last hearing you relied on payments that were made in  
11 August of 2004 before --

12 THE COURT: Up to then.

13 MR. MINSON: Up to -- yeah, there were I think  
14 two or three payments made in or about July and August of  
15 2004; those months, so maybe July, August, September 2004  
16 in the amounts of \$7500. However, those payments were  
17 not -- and then a stipulation in 2004, in October 15th,  
18 was entered into -- we, our contention is that the  
19 payments that were made in 2004 prior to the 2004  
20 stipulation were to the Cadle Company. So they were not  
21 made to Mazella. The 2001 agreement required payments be  
22 made directly to Mazella of 12,500.

23 In 2004 there were some agreements, there were  
24 some discussions with the Cadle Company, with Feldstein  
25 and Mazella where they started to try to discuss about a

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1 new agreement. Even that agreement was signed in October  
2 of 2004 there were payments that Feldstein made of the  
3 7500 which was the number required under the 2004  
4 agreement, before that 2004 agreement was executed.

5 That, we believe, does not revive the 2001  
6 agreement. Those payments were made during the  
7 negotiations of the 2004 agreement. So those -- and they  
8 were a different amount than the 2001 agreement, and they  
9 were to a different party. They were actually directly  
10 to Mazella.

11 So last time I was a little bit caught off  
12 guard when the discussion came because I was not aware of  
13 those payments that were made in August and September,  
14 because the reason why I wasn't aware of them because  
15 they were not made directly to Mazella which is what they  
16 were required to be made under the 2001 agreement. And  
17 that is the reason we believe that those payments don't  
18 all of a sudden revive the 2001 agreement.

19 MR. ORTIZ: Your Honor, if I may just say, the  
20 indemnification agreement contained in the 2001 order  
21 specifically provides that Mr. Feldstein will indemnify  
22 and hold harmless the Mazellas.

23 If Your Honor were to find, and this is one of  
24 the reasons why we made the motion, if Your Honor were to  
25 find that this order is a final order of the Court, and

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1 there isn't a statute of limitations issue here, the  
2 order is abundantly clear that this -- that Mr. Feldstein  
3 is required to indemnify Mr. Mazella.

4 THE COURT: Doesn't the order just approve the  
5 settlement agreement?

6 MS. ORTIZ: Yes.

7 MR. MINSON: Yes, Your Honor.

8 MS. ORTIZ: Yes, and it's a final, and it's a --

9 THE COURT: So wouldn't the settlement  
10 agreement be the operative document?

11 MS. ORTIZ: I'm sorry? That's what I'm trying  
12 to --

13 THE COURT: Wouldn't the settlement agreement  
14 be the operative document as opposed to the order?

15 MR. MINSON: The settlement agreement is an  
16 exhibit to --

17 MS. ORTIZ: It's attached.

18 MR. MINSON: -- the order.

19 MS. ORTIZ: Yeah. It incorporates that, yeah.

20 THE COURT: Right. And the order approves the  
21 settlement agreement.

22 MS. ORTIZ: Yes.

23 THE COURT: So why would the, why wouldn't the  
24 limitations period apply to the settlement agreement?

25 MS. ORTIZ: Why wouldn't it apply, Your Honor?

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1 THE COURT: Right.

2 MS. ORTIZ: Because our argument is that it's a  
3 final order, it's a final order of the Court enforcing  
4 the terms of this agreement. And if you don't find that  
5 it would require the debtor to restart again, and the  
6 debtor already went through this cause of action. That  
7 is --

8 THE COURT: No, but this --

9 MR. MINSON: But Your Honor, it was a stip- --

10 THE COURT: There's a -- I don't, first of all  
11 that argument I don't think is made in the motion. I  
12 don't see that argument anywhere in the motion.

13 MS. ORTIZ: I believe it is, Your Honor. I  
14 believe it is.

15 THE COURT: Well is there any authority for the  
16 proposition that -- look, the bankruptcy code requires  
17 the bankruptcy court to approve any settlement agreement.

18 MS. ORTIZ: Yes.

19 THE COURT: I don't think that -- my  
20 understanding is that that does not change the statute of  
21 limitations running on a breach of the settlement  
22 agreement. You can't just say, oh, well because there's  
23 an order it's, there's no such thing as a statute of  
24 repose because the order is always there. I guess the  
25 parties could do that through an order. I guess. But I

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1 don't see any --

2 MR. MINSON: But, Your Honor --

3 THE COURT: Let me finish.

4 MR. MINSON: Sure, I'm sorry.

5 THE COURT: I'm making your point.

6 MR. MINSON: You're right, I'm sorry.

7 THE COURT: What -- what's the authority to say  
8 that an order approving the settlement agreement negates  
9 any statute of limitations for breach of the settlement  
10 agreement?

11 MS. ORTIZ: It was our reading, Your Honor,  
12 it's our argument that the order is final in --

13 THE COURT: I know there's an argument, but --

14 MS. ORTIZ: -- terms of the --

15 THE COURT: -- there's still a limitations  
16 period. I mean what, is there any case that says that?

17 MS. ORTIZ: Not completely on point, Your  
18 Honor.

19 THE COURT: Is there any case even close?

20 MS. ORTIZ: We just cited that it was a final  
21 order of the court.

22 THE COURT: All right. So I don't think that  
23 argument's going to work.

24 MS. ORTIZ: Okay.

25 THE COURT: I do, I do think though -- I mean

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1 my inclination is that the Riso affirmation --

2 MS. ORTIZ: Yes, Your Honor.

3 THE COURT: -- from September 13 or September  
4 14?

5 MS. ORTIZ: Yes, Your Honor.

6 THE COURT: Let me just check.

7 (Pause)

8 THE COURT: September 13, 2004.

9 MS. ORTIZ: Yes.

10 THE COURT: Is cited, and it's, you know,  
11 documented on the record of course, but if it's cited in  
12 the plaintiff's rule 7056 statement as the basis for  
13 tolling the limitation or reviving the limitations  
14 period.

15 MS. ORTIZ: Yes. Yes, Your Honor.

16 THE COURT: In paragraph 16 of that statement.  
17 And the response to paragraph 16 admits that the Riso  
18 affirmation acknowledged the defendant performed under  
19 the 2001 bankruptcy stipulation and it paid over a  
20 million one under that agreement and that defendant had  
21 tendered a series of post-dated monthly checks to --  
22 should be Cadle, cable company, it says in this, but  
23 should be Cadle -- each in the amount of \$7500 covering  
24 the period February 15, 2014 to May 15, 2015.

25 MS. ORTIZ: Yes.

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1 THE COURT: And refers the Court to the  
2 affirmation for the facts alleged therein.

3 So I've read the affirmation again, I mean I  
4 read it obviously for the June 17th hearing. So let me  
5 turn to that. It's an exhibit to the motion -- the  
6 debtor's motion.

7 (Pause)

8 THE COURT: And it's the affirmation of Gerard  
9 A. Riso -- is he the named partner in your firm?

10 MR. MINSON: Yes, he is

11 THE COURT: Okay, all right. So it shouldn't  
12 be a big surprise what he says in there.

13 Paragraph 7 --

14 MS. ORTIZ: Yes.

15 THE COURT: By the way this is dated September  
16 13, 2004 before the settlement agreement.

17 MR. MINSON: But, Your Honor, it was filed  
18 October 24, 2004.

19 THE COURT: It's dated September 13th and it's  
20 in response or in support of Mr. Feldstein's opposition  
21 to being joined as a -- to an order to show cause as a  
22 party to this collection action by Cadle.

23 And paragraph 7 it says, Mr. -- and it's trying  
24 to, I guess, justify that really you don't need to  
25 involve us in here because we're trying to do the right

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1       thing. "Mr. Feldstein has in fact reached an interim  
2       arrangement with plaintiff." Which this is the -- I  
3       think a pretty key clause, "which he entered into  
4       pursuant to his obligations to Dr. Mazella pursuant to  
5       the agreement." The agreement being the 2001 settlement  
6       agreement.

7                   And then as acknowledged in the 7056 response  
8       in front of me by Mr. Feldstein he says in paragraph 8,  
9       "Mr. Feldstein has continued to make good on the post-  
10       dated checks provided to plaintiff on February 11th."

11                  And then if you go to page 5, paragraph 11,  
12       "Mr. Feldstein has diligently attempted to meet his  
13       obligations." And his obligations, as he's referring to  
14       them, I believe, and this is clarified I believe in the  
15       next two sentences, are his obligations under the 2001  
16       agreement. He says, right after that sentence, "Mr.  
17       Feldstein has diligently attempted to meet his  
18       obligations." He says, "He has paid over 1.1 million  
19       under the agreement."

20                  MS. ORTIZ: Yes.

21                  THE COURT: The agreement being the Mazella  
22       agreement, the settlement agreement from 2001. "He has  
23       not ignored plaintiff, paying significant sums which he  
24       continues to pay." He represented this in September  
25       13th, 2004 in his declaration on behalf of Feldstein.

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1 MS. ORTIZ: And checks were --

2 THE COURT: And then he says, "Thus if Dr.

3 Mazella believes he's entitled to additional payments  
4 from Mr. Feldstein he has remedies under the confession  
5 of judgment."

6 To me he's reaffirming the debt. He says I owe  
7 it on behalf of Feldstein. And of course that's in  
8 September, that's before the 2004 October settlement and  
9 it's clearly within six years of the commencement of this  
10 case which was in June of 2010, and the complaint was  
11 filed within the 180 day period provided in the  
12 bankruptcy code for tolling.

13 MS. ORTIZ: our Honor, I've also argued that --

14 THE COURT: So I don't see, I mean this is --  
15 it's clearly the memorandum doesn't deal with this at  
16 all. The memorandum, kind of amazing to me given that I  
17 went through this in detail in June, simply says that the  
18 payments were made under the October agreement. That's  
19 completely contradicted by Mr. Riso's declaration from  
20 September, and by the 7056 response which makes it clear  
21 that payments were being made in July and August and  
22 refers me to the Riso affidavit which says that, you  
23 know, we're living up to our agreement. The agreement  
24 with Mazella.

25 And that was perfectly appropriate for him to

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1 say it then because that agreement is an indemnification  
2 agreement and, you know, he could take the view that, in  
3 litigation, that yeah it's an indemnification agreement  
4 and we don't have to do anything more than that. Bring  
5 us in when there's a default. We're on board here.  
6 We're dealing with it, and we continue to deal with it.  
7 So don't include us in this state court litigation  
8 between the Cadle company and Mazella.

9 I mean is there any response to that?

10 MS. MINSON: Just that, the response was at  
11 that point there was a breach and at that point they had  
12 been making, they had been in discussions with -- the  
13 payments that he refers to, the \$7500 payments that Mr.  
14 Riso refers to were going directly to the Cadle Company.

15 THE COURT: To honor, to comply with his  
16 obligations under the agreement. That's what he says.

17 MR. MINSON: No, our position --

18 MS. ORTIZ: He wouldn't --

19 MR. MINSON: -- is that he was doing it under  
20 the guise of the new agreement that they were  
21 negotiating.

22 THE COURT: There wasn't one. The date is  
23 different.

24 MR. MINSON: There wasn't one at that time.

25 THE COURT: No. There wasn't. There's no way.

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1 There wasn't.

2 MR. MINSON: I do see the --

3 THE COURT: I mean it just stares you right in  
4 the face. The other one is from October. This is  
5 September. And he's filing it, he's obviously filing  
6 this affirmation because at that point they were not in  
7 agreement. There is no reason to file it. He could have  
8 said we're in the middle of settlement discussions,  
9 Judge, put this off. That's not what he says. He's  
10 basically arguing the merits of this order to show cause.

11 MR. MINSON: I do see the Court's position,  
12 Your Honor.

13 THE COURT: So I just -- and again the  
14 memorandum doesn't, the memorandum in support of the  
15 cross motion and in opposition to Mazella's summary  
16 judgment motion doesn't even address the statute of  
17 limitations revival case law that I referred to back in  
18 June, the leading case being Roth v. Michelson 55 N.Y. 2d  
19 278, 449 N.Y.S. 2d 159, 161 (1982) which -- see also, In  
20 Re: Dreier, LLP, 421 B.R. 60 at 63 (Bankr. S.D.N.Y 20 09)  
21 where Judge Bernstein quotes the Michelson case, where he  
22 says, "There's a longstanding common law rule that a part  
23 payment" -- part payment, \$7500 a month -- "of a debt  
24 otherwise outlawed by the statute of limitations is made  
25 under circumstances from which a promise to honor the

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1       obligation may be inferred, it will be effected to make  
2       the time limited for bringing an action, start anew from  
3       the time of such payment."

4               And, you know, I would think that one could  
5       infer that literally from the 7500, but I think that the  
6       Riso affidavit makes it crystal clear when he says again  
7       he's in fact reached a arrangement which he entered into  
8       pursuant to his obligations to Dr. Mazella pursuant to  
9       the agreement. And, you know, where he says later the  
10      language I quoted, it just seems to me that he's saying  
11      we're on board. He didn't have to say that, but that in  
12      September of 2004 does -- you know, I think that's what  
13      it does.

14               So to me the limitations period hasn't run on  
15      the first one, the 2001 settlement. The bankruptcy  
16      stipulation from June 28, 2001 and the counter  
17      designation the -- Feldstein's 7056 statement  
18      acknowledges that that agreement is an indemnification  
19      agreement which it would have to, because that's what it  
20      says in the agreement.

21               So I think the indemnification claim is --  
22      that's the only defense to that obligation under that  
23      agreement and there's no defense. So I'm going to grant  
24      summary judgment on that one. There's no real defense to  
25      it on the statute of limitations ground.

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1 I don't think, well I agree with you that the  
2 ruling by the state court judge that Mr. Feldstein the  
3 primary obligor under that agreement, that 2001  
4 agreement, I don't think that is binding on Mr.  
5 Feldstein. I'm not sure it matters based on the fact  
6 that there's no statute of limitations defense to it  
7 because you're looking to enforce it as an indemnity.

8 MS. ORTIZ: Yes.

9 THE COURT: I don't think it's argued that the  
10 later on supercedes that agreement. In fact it's argued  
11 to the contrary that it's a separate agreement because  
12 it's with Cadle as well as Mazella being a part of the  
13 action.

14 But I guess we should turn to whether the, I  
15 mean there are three causes of action in the complaint.  
16 I've just given you -- I've granted the summary judgment  
17 motion on --

18 MS. ORTIZ: Well one of them was breach of  
19 contract, Your Honor, which --

20 THE COURT: Right.

21 MS. ORTIZ: -- we would withdraw at this point.  
22 It doesn't make --

23 THE COURT: Well I've given you, well --

24 MS. ORTIZ: I shouldn't say that. I shouldn't  
25 have said that --

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1 THE COURT: No, there's --

2 MS. ORTIZ: No, I'm sorry.

3 THE COURT: No there's no reason to withdraw  
4 that.

5 MS. ORTIZ: I'm sorry, I'm sorry about that.

6 MR. MINSON: Okay.

7 THE COURT: No, I don't think you meant to say  
8 that. That was just a brain freeze.

9 MS. ORTIZ: I said -- I should have the unjust  
10 enrichment.

11 THE COURT: Unjust enrichment would not apply.

12 MS. ORTIZ: Unjust enrichment, Your Honor. And  
13 I think the first one was just declaratory judgment.

14 THE COURT: Right. That is the primary  
15 obligor. I don't know if you're pursuing that, I --

16 MS. ORTIZ: I don't think we have to.

17 THE COURT: Clearly the second one and the  
18 third one would be, you know, you'd get summary judgment  
19 on because the only defense --

20 MR. MINSON: The second and fourth?

21 THE COURT: No, the second and third. There's  
22 the indemnification is the second --

23 MS. ORTIZ: Well third is unjust --

24 THE COURT: Oh, I'm sorry, the second and  
25 fourth. You're right.

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1 MR. MINSON: Second and fourth.

2 MS. ORTIZ: Second and fourth.

3 THE COURT: Second and fourth, I'm sorry,  
4 you're right, you're right.

5 There would be no reason to grant the third one  
6 anyway because the contracts --

7 MS. ORTIZ: Yes.

8 THE COURT: -- that cover this --

9 MS. ORTIZ: Yes, Your Honor.

10 THE COURT: But in any event you're withdrawing  
11 that one.

12 But on the second one, indemnification the only  
13 defense to that was statute of limitations on the 2001  
14 stipulation and I've ruled on that.

15 And on the third, again, the only defense to  
16 that is the statute of limitations.

17 MR. MINSON: Statute of limitations.

18 THE COURT: So I've ruled on that.

19 It does appear to me that the 2004 settlement  
20 does make Mr. Feldstein the primary obligor. The only  
21 right under that settlement, this is again the October  
22 14, 2004 settlement, the only right that Cadle has to go  
23 against Dr. Mazella under that settlement is if Mr.  
24 Feldstein is not making timely payments.

25 MS. ORTIZ: Yes.

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1                   THE COURT: And that's set forth in a couple of  
2 places; paragraph 5 --

3                   MS. ORTIZ: Yes.

4                   THE COURT: -- sets forth the default  
5 mechanism, and then it ties into paragraph 8 which is  
6 really the key paragraph which says, "Cadle agrees that  
7 it shall not act in any way to enforce the judgment it  
8 holds against Mazella during the time that Feldstein is  
9 making timely payments as set forth above. Cadle shall  
10 be entitled to enforce it's judgment against Mazella in  
11 the event that Feldstein defaults and fails to cure the  
12 same."

13                  They've done that. I mean Feldstein did  
14 default, but that -- those two paragraphs combined make  
15 Feldstein the primary obligor. It's not -- this isn't an  
16 indemnification.

17                  MS. ORTIZ: I'm sorry, I didn't hear you.

18                  THE COURT: This agreement, the October 2004  
19 agreement, is not an indemnity agreement.

20                  MS. ORTIZ: Yes.

21                  THE COURT: But he's the primary obligor under  
22 that agreement.

23                  MS. ORTIZ: Yes.

24                  THE COURT: So I'm -- unless I'm missing  
25 something that's the plain language of the parties, that

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1 I would -- I would grant summary judgment on that point  
2 with regard to Count I. I don't think I'm prepared to do  
3 it as to the 2001 stipulation as to Count I. I know that  
4 that was the logic in -- make sure I have her name right  
5 -- Justice Shafer's --

6 MS. ORTIZ: Yes.

7 THE COURT: -- order, but it was really kind  
8 of, it was really in the context of -- well first of all  
9 Feldstein was not a party to, at that point to the  
10 litigation.

11 MS. ORTIZ: Yes.

12 THE COURT: So it's not binding as a matter of  
13 collateral estoppel or res judicata.

14 MS. ORTIZ: Right.

15 THE COURT: And it was in essence to get  
16 Feldstein, to delay the litigation until the Feldstein  
17 issue could be decided as far as joinder. And I think  
18 that, frankly my reading of the settlement agreement is  
19 ambiguous as to whether they're the primary obligor under  
20 that settlement agreement. It's clearly an  
21 indemnification agreement?

22 MS. ORTIZ: Yes.

23 THE COURT: But I, I would -- I think it's  
24 irrelevant frankly because you're looking simply to  
25 enforce your indemnification claim --

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1 MS. ORTIZ: Yes.

2 THE COURT: -- against him. But I'm not  
3 prepared on a summary judgment basis to find that he's  
4 the primary obligor under it. I'd like to get more of a  
5 context of how was, what was intended.

6 MS. ORTIZ: I understand, Your Honor.

7 THE COURT: Okay.

8 MR. MINSON: So just to clarify, the summary  
9 judgment on indemnification and breach of contract --

10 THE COURT: Right.

11 MR. MINSON: -- as to --

12 THE COURT: As to both agreements.

13 MR. MINSON: -- 2001 and 2004 --

14 THE COURT: Well 2004 there's no issue.

15 MR. MINSON: Yeah. And as to -- yes, you're  
16 correct.

17 THE COURT: Summary judgment in your favor as  
18 to Count 3 -- or actually it's withdrawn.

19 MR. MINSON: And the summary judgment as to the  
20 2004 agreement as --

21 THE COURT: That's to Count 1.

22 MR. MINSON: -- to Count 1 being the primary  
23 obligor.

24 THE COURT: Right. Right.

25 MS. ORTIZ: And 3 is withdrawn.

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1                   THE COURT: We went through this fairly quickly  
2                   but I think it's a fairly simple analysis, and I don't  
3                   have to give you the standards on summary judgment. This  
4                   clearly fits within the summary judgment rubric. There  
5                   are no disputed facts on this issue. I've read the  
6                   sections of the 756 statements that refer me back to Mr.  
7                   Roth's declaration. There's no facts saying that that  
8                   declaration was somehow wrong or incorrect or whatever so  
9                   it speaks for itself.

10                   To me it is clear from that declaration that  
11                   under the -- consistent with the Roth v. Michelson case  
12                   as of September 2004 Mr. Feldstein through his counsel,  
13                   who was filing the declaration on his behalf, was making  
14                   it clear that he continued to promise to honor that  
15                   obligation notwithstanding the earlier default in 2003.  
16                   The obligation being the 2001 bankruptcy stipulation.

17                   MS. ORTIZ: And may I just note one thing for  
18                   the record, Your Honor. It is that we also did a cert  
19                   that says that payments were tendered through '05 and  
20                   went into '05.

21                   THE COURT: Well, yeah.

22                   MS. ORTIZ: It wasn't just as '04, it went into  
23                   '05 and payments were made through '05.

24                   THE COURT: Right.

25                   MS. ORTIZ: So if there was any question about

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1 what month it --

2 THE COURT: No, they were --

3 MS. ORTIZ: -- was in 2004, it did go into  
4 2005.

5 THE COURT: Right, but the post-dated checks  
6 went through --

7 MS. ORTIZ: Yes, through 2004.

8 THE COURT: Right. But September 2004 the  
9 case, the bankruptcy case was filed --

10 MS. ORTIZ: I think in June.

11 THE COURT: June 2010.

12 MS. ORTIZ: Yes.

13 THE COURT: So even from September, and that  
14 would be sufficient. It was, it was filed June 1, 2010.  
15 And 108(a)2 of the Bankruptcy Code provides for a two-  
16 year extension --

17 MS. ORTIZ: Yes.

18 THE COURT: -- of the limitations period and  
19 this adversary proceeding was filed well within that; it  
20 was filed December 31, 2010.

21 MS. ORTIZ: 2010.

22 THE COURT: So it's seven months later. So the  
23 adversary is timely.

24 I should have started this whole process, I  
25 apologize for going back to it now, by noting that I had

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1 my Chapter 13 calendar yesterday.

2 MS. ORTIZ: Yes, Your Honor.

3 THE COURT: The Chapter 13 Trustee had a motion  
4 on --

5 MS. ORTIZ: Yes, Your Honor.

6 THE COURT: -- to dismiss this case for failure  
7 to perform plan payments.

8 MS. ORTIZ: Yes, Your Honor.

9 THE COURT: And I granted that motion although  
10 I made it clear that I might reconsider it if there was  
11 anything under the plan that had been performed by the  
12 debtor and the debtor was going to catch up on the  
13 payments.

14 But separate and apart from that, and I want to  
15 get this out on the record, I do not believe under the  
16 law in this circuit that my dismissal of the case, and  
17 the order hasn't been entered yet because it was just  
18 yesterday afternoon that I had the hearing, but the  
19 dismissal of the case does not automatically result in  
20 the requirement that I dismiss this adversary proceeding.

21 The courts have long held, including in the  
22 Second Circuit, that the court has discretion under  
23 Section 349 which specifically authorizes the bankruptcy  
24 court to alter the normal effect of dismissal, which is  
25 that it gets rid of everything in the bankruptcy case,

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1 and it's introduction says "unless the court for cause  
2 orders otherwise." But the court has discretion to keep  
3 jurisdiction over a pending adversary proceeding.

4                   And in going through that discretionary  
5 analysis the court is supposed to consider judicial  
6 economy, fairness and convenience to the parties and the  
7 degree of difficulty of the state law issues involved.

8                   See generally In Re Porges, P-o-r-g-e-s, 44 F.  
9 3d 159, 162 through 630 (2d Cir. 1995), as well as for  
10 the factors, see in addition to that case, In re  
11 Carraher, 971 F. 2d 327, 328 (9th Cir. 1992), In re  
12 Morris, 950 F. 2d 1531, 1534 (11th Cir. 1992) -- I'm  
13 sorry, 1535. And In re Roma Group, Inc., 137 B.R. 150,  
14 151 (Bankr. S.D.N.Y. 1992), and In re Stardust Inn, Inc.,  
15 70 B.R. 888, 890-891 (Bankr. E.D. PA 1987).

16                   Here obviously I've, as you noted at the start  
17 of this hearing Ms. Ortiz I've been presiding over this  
18 litigation, had rulings on the motion to dismiss the  
19 initial complaint, leave to amend that complaint, on  
20 motion to dismiss the second amended complaint, this  
21 summary judgment hearing had been scheduled for months.  
22 I think there'd be a, you know, it's hard to find a  
23 better case for continuing jurisdiction on grounds of  
24 judicial economy, fairness and convenience to the parties  
25 et cetera.

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1                   As far as the state law issues it's really a  
2 summary judgment, I mean it's pretty simple. So given  
3 that fact --

4                   MS. ORTIZ: Your Honor, may I just ask you for  
5 clarification?

6                   THE COURT: -- I will, I had concluded even  
7 yesterday, but also today that I would keep jurisdiction  
8 over this proceeding at least through the summary  
9 judgment. If I denied summary judgment I would consider  
10 sending it back to state court, but I don't see a basis  
11 for that here.

12                  MS. ORTIZ: May I just ask you for some  
13 clarification, Your Honor?

14                  THE COURT: Sure.

15                  MS. ORTIZ: Mr. Malera (ph) informed me that I  
16 should contact Ms. Cava (ph) that you had dismissed the  
17 case but that --

18                  THE COURT: Right.

19                  MS. ORTIZ: -- I should try to speak to her  
20 about --

21                  THE COURT: Only if there was something besides  
22 this litigation that you wanted to deal with in the case.  
23 If there was a Chapter 13 plan issue that I was missing  
24 -- the way he phrased it at the hearing was, Ms. Ortiz  
25 asked that it not be dismissed because we have summary

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1 judgment on tomorrow. And, you know, Porges deals with  
2 that.

3 MS. ORTIZ: I understand now.

4 THE COURT: And, so, if that was the only  
5 factor I was going to dismiss the case because he hadn't  
6 made his payments, and I would deal with this litigation  
7 as I, you know, as has transpired today. Or if I denied  
8 summary judgment, I might have sent it back.

9 But if there was something else, for example, I  
10 don't recall -- for example if you had gotten a Pond  
11 motion and stripped off a second lien which only works in  
12 a bankruptcy -- if there were any things like that where  
13 a Chapter 13 plan was important, I'd give you a chance to  
14 cure the default and so would the Trustee, and I would --  
15 she would pull, frankly, she would pull --

16 MS. ORTIZ: Okay.

17 THE COURT: -- that or adjourn her motion to  
18 dismiss.

19 MS. ORTIZ: The only reason why it's important,  
20 Your Honor, is that the Cadle Company is extremely  
21 aggressive in its collection against the debtor.

22 THE COURT: Well then he needs to make his plan  
23 payments. Then he should make his plan --

24 MS. ORTIZ: And he will.

25 THE COURT: -- payments by Monday. Because

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1 otherwise -- or today even or tomorrow because otherwise  
2 she's going to submit the order. If he makes the plan  
3 payments she's not going to submit it.

4 MS. ORTIZ: Okay. That was my question.

5 THE COURT: Okay.

6 MS. ORTIZ: That was my question. All right.

7 THE COURT: All right.

8 MS. ORTIZ: Thank you very much, Your Honor.

9 THE COURT: But that, the only reason he gave  
10 was that we had summary judgment, but I've given you the  
11 case law on that so I didn't need to keep the Chapter 13  
12 in place for that --

13 MS. ORTIZ: I see, Your Honor.

14 THE COURT: -- for that purpose.

15 MS. ORTIZ: All right. Well thank you very  
16 much, Your Honor. I will straighten that out.

17 THE COURT: Okay. So I'm going to look for an  
18 order from counsel for the debtor/plaintiff, it should  
19 put in it that the unjust enrichment cause of action is  
20 withdrawn.

21 MS. ORTIZ: Yes.

22 THE COURT: And grants summary judgment on the  
23 other three, and denies summary judgment on the other  
24 three -- the cross motion for summary judgment on the  
25 other three, except and respective -- unless, maybe

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1 you're going to withdraw that too, the request for  
2 declaratory judgment that the 2001 stipulation is one of  
3 primary obligation.

4 MS. ORTIZ: Thank you very much, Your Honor.

5 MR. MINSON: Okay. Thank you very much, Your  
6 Honor.

7 THE COURT: I mean I'm assuming that you're  
8 not, I'm assuming this is over at this point. I mean  
9 there are appeal rights but --

10 MS. ORTIZ: It's not over for John Mazella  
11 until he pays off the --

12 THE COURT: No, no, I'm not talking about this  
13 adversary proceeding.

14 MS. ORTIZ: I hope so, Your Honor.

15 THE COURT: No, no, you're not -- I'm not being  
16 clear. I didn't grant you summary judgment on a little  
17 portion of your motion.

18 MS. ORTIZ: I understand.

19 THE COURT: I don't know if you're going to be  
20 asking for a trial on that or not or whether you're  
21 satisfied with the rulings in the way that declaratory  
22 judgment request was sort of an alternative request as to  
23 the 2001.

24 MS. ORTIZ: No, I'm satisfied with the ruling.

25 THE COURT: All right. Fine. So then I think

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1 you should say the adversaries are closed.

2 MS. ORTIZ: Okay.

3 THE COURT: I mean you should provide for the  
4 closing of the adversary.

5 MS. ORTIZ: All right. Thank you very much.

6 THE COURT: Okay.

7 MR. MINSON: Thank you, Your Honor.

8 THE COURT: Thank you.

9 \*\*\* (Whereupon the matter concluded) \*\*\*

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PAGE

5 Motion for Summary Judgment (Adversary

6 Proceeding 10-08455) -

7 Count I - statute of limitations - granted

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8 Count II - indemnification - granted

21

9 Count III - unjust enrichment - withdrawn

21

10 Count IV - breach of contract - granted

21

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12 Cross Motion for Summary Judgment (Adversary

13 Proceeding 10-08455) - denied except for

14 declaratory judgment

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CERTIFICATION

I, Nancy B. Gardelli, certify that the foregoing transcript is correct, to the best of my ability, from the official electronic sound recording of the proceedings in the above-entitled matter.



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Nancy B. Gardelli, Notary Public  
Commission expires: 6/28/15  
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